TAN BOK SEONG @ TAN LEONG TIAN

v.

SIN BEE SENG & CO. (PORT WELD) SDN. BHD. & 4 ORS.

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL SUIT NO. 22-11-1992]
19 MAY 1995

LAND LAW: *First defendant agreeing to lease charcoal kilns to plaintiff - First defendant holder of TOL for land on which the kilns stand - Mangrove trees used for the production of charcoal in the kilns - Agreement between plaintiff and first defendant providing that plaintiff entitled to extract mangrove trees from 21 acres of land comprised in TOL - Whether agreement to lease charcoal kilns was intact assignment of TOL - Whether s. 68 National Land Code 1963 applicable - Whether agreement illegal for being in contravention of s. 68.*

COMPANY LAW: *Plaintiff director of first defendant company - Plaintiff entering into agreement to lease charcoal kilns from first defendant - Plaintiff claiming specific performance and/or damages for breach of agreement - Defendants alleging breach of s. 131(1), (5) of the Companies Act 1965 - Whether contravention of s. 131 renders agreement void - Whether there was failure to disclose interest - Whether there was de facto declaration of interest by the plaintiff - Whether s. 132C(l) (b) of the Companies Act 1965 applicable.*

The first defendant (the company) owns a total of seven kilns on land held under a temporary occupation licence (TOL). The company's primary business is and was, at all material times, the extraction of mangrove wood from lands held by the company under TOL for the purposes of processing and producing charcoal. The company was formed by the plaintiff and his elder brother, the second defendant.

By an agreement in writing dated 18 October 1985 entered into between the plaintiff, the second defendant and the company, the company and the second defendant agreed to lease to the plaintiff 3 kilns "for a term of 99 years or until the company winds up or when the said licence is withdrawn or terminated by the relevant authority whichever is the earlier.....in consideration of the sum of RM60,000 which the plaintiff paid to the company.

The plaintiff claimed that the second defendant and his children, the third, fourth and fifth defendants had put various obstacles in the way of his utilising the said kilns which actions finally culminated in his removal as a director of the company. In the circumstances the plaintiff claimed for specific performance of the agreement and/or damages for breach of contract as against the first and second defendants and damages for conspiracy as against the second, third, fourth and fifth defendants.

The defendants argued that the agreement between the plaintiff and the first defendant was an assignment of the TOL and, consequently, was illegal for contravening s. 68 of the National Land Code 1965. The defendants further argued that there was a breach of s. 131(1) & (5) of the Companies Act 1965, in that there was non-disclosure by the plaintiff of the nature of his interest at a meeting of the board of directors of the company, which rendered the agreement void under s. 24 of the Contracts Act 1950.

The defendants' argument that there was breach of s. 132C(l)(b) of the Companies Act 1965 was dismissed on the grounds that this section was inserted by the Companies (Amendment) Act 1985 which came into effect on 1 February 1986 and as the said section came into being

after the agreement between the plaintiff and the first defendant was signed, it cannot apply to cripple the plaintiff's position.

Held:

[1] A close perusal of the agreement in the present case would show that the contract is a contractual licence to use three kilns. It does not purport to transfer or assign any interest or any right in the relevant TOL land. A lease of three kilns built on TOL land should not be regarded as a colourable attempt to transfer the company's rights and interests under the TOL to the plaintiff. On the contrary it was clear that in fact the plaintiff's fate under the agreement to extract mangrove to burn in the three kilns would solely be dependent on the company's success at securing TOL lands from the Forestry Department. In the circumstances, on a plain and grammatical reading of clause 1 of the agreement, it was not the intention of the parties to transfer or assign the licence to the plaintiff in contravention of s. 23(l) of the National Forestry Act 1984.

[2] On the available evidence, there was *de facto* declaration by the plaintiff of his interest in the company because at the material time there were only three directors of the company including the plaintiff and the second defendant who were signatories to the agreement. As these two directors could constitute a meeting, an irresistible inference can be deduced that the plaintiff had declared his interest to the second defendant when they both met and discussed about the agreement.

[3] Furthermore, in the absence of any specific or prescribed form of declaration of interest, the negotiations between the plaintiff and the second defendant which culminated in the signing of the agreement should reasonably be construed as sufficient declaration of the plaintiff's interest in the agreement. In the circumstances when the agreement was actually signed by the plaintiff and the second defendant, the company must have notice, whether actual or constructive, of the plaintiff's interest in the agreement.

[4] In any event, even if there was in fact no declaration of the plaintiff's interest at the Board of Directors' meeting, and applying the principle in the case of *Hely-Hutchinson v. Brayhead Ltd & Anor.,* the agreement was merely voidable. The company allowed the agreement to continue for at least five years and had taken no steps to rescind the agreement. This act of condoning the existence of the agreement would now serve as an estoppel by conduct and it is too late in the day for the defendants to now say that the agreement is void.

[5] When the second defendant and his children took control of the company, the plaintiff finally found himself ousted as director of the very company which he helped to form. The conspiracy between the second to fifth defendants was the cause and effect of the breach of the agreement. The act of knowingly procuring or inducing a third party to break its contract to the damage of the other contracting party without reasonable justification or excuse is a tortious wrong. In the circumstances of the present case the predominant purpose of the defendants in striping the initial power of the plaintiff in liasing and dealing with the Forestry Department for the allocation and allotment of mangrove lands to the company was solely to injure the plaintiff. Therefore there was a conspiracy by the second, third, fourth and fifth defendants and each of them against the plaintiff.

[Plaintiff's claim for damages against the first and second defendants for breach of contract allowed with costs. Plaintiff's claim for damages for conspiracy allowed with costs. Damages to be assessed by the Senior Assistant Registrar].

Cases referred to:
Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy [1983] 2 MLJ 121 ***(dist)***
Hee Cheng v. Krishnan [1955] MLJ 103 ***(dist)***
Murugesan v. Krishnasamy & Anor. [1958] 24 MLJ 92 ***(dist)***
Tan Bing Hock v. Abu Samah [1968] 1 MLJ 221 ***(dist)***
Govindaraju v. Krishnan [1962] 28 MLJ 334 ***(dist)***
Hely-Hutchinson v. Brayhead Ltd., And Another [1968] 1 QB 549 ***(foll)***
Aberdeen Railway Co. v. Blaikie Brother [1854] 2 Eq Rep. 1281 ***(refd)***
Furs Ltd. v. Tomkies [1936] 54 CLR 543 ***(refd)***
Emile Erlanger And Other v. The New Sombrero Phosphate Company And Other [1878] 3 App. Cas 1218 (HL (E) Vol. 111) ***(refd)***
Teoh Kee Keong v. Tambun Mining Co. Ltd. [1968] 1 MLJ 39 ***(refd)***
Goldsoll v. Goldman [1914] 2 Ch 603 ***(refd)***
Quinn v. Leathem [1901] AC 495 ***(refd)***
Crofter Hand Woven Harris Tweed Co. Ltd. And Other v. Veitch And Another [1942] AC 435 ***(refd)***
Sudbrook Trading Ltd. Eggleton [1983] AC 44 ***(refd)***

Legislations referred to:
Contract Ordinance s. 24
Companies Act 1965, s. 131(1), (5), 132C(1)(b)
Companies (Amendment) Act 1985 (Act 616)
Companies (Amendment) Act 1986 (Act A657)
National Land Code, ss. 68, 416
National Foresty Act 1984, s. 23

For the plaintiff - Teo Bong Kwang; M/s. Raja, Darryl & Loh
For the defendants - Bryan Shankar; M/s. Khalid Chung & Shankar

JUDGMENT

Abdul Malik Bin Ishak J:

The plaintiff is the younger brother of the second defendant and together they formed the company known as Sin Bee Seng & Co. (Port Weld) Sdn. Bhd. (the first defendant and hereinafter referred to as the "company") on 23 March 1979 (see p. 24 of the agreed bundle at "AB 2"). The company, at all material times, owns a total of seven (7) kilns on lands held by the company under a temporary occupation licence ("TOL") for the processing of charcoals and these kilns are identified by the numbers 3, 4, 7, 9, 12, 17 and 19. The pleadings indicated that the parties agreed that the issued and paid up capital of the company was RM10,000 made up of 10,000 ordinary shares of RM1,00 each and the shareholders of the company comprised, at all material times, the plaintiff, which had 2,200 shares, the second defendant, holding 1 share and the third defendant holding 7,799 shares. It is also not disputed and agreed by the parties as reflected in the pleadings that the company's primary business is and was, at all material times, the extraction of mangrove wood from lands held by the company under TOL for the purposes of processing and producing charcoals. Under re-examination of the plaintiff, it was established that the third, fourth and fifth defendants were the children of the second defendant and this in turn would make them the nephews and niece of the plaintiff respectively. Bluntly put, the company is a family venture between the parties. By an agreement in writing dated 18 October 1985 entered between the plaintiff, the second defendant and the company (hereinafter referred to as the "agreement"'), at the request of the plaintiff, the company and the second defendant agreed to lease to the plaintiff kilns numbers 12, 17 and 19:

> for a term of ninety nine (99) years or until the company winds up or when the said licence is withdrawn or terminated by the relevant authority whichever is the earlier, and upon the terms and conditions hereinafter contained.

In consideration of the sum of RM60,000 which the plaintiff had to pay the company (see cl. 1 of the agreement at p. 70 of "AB 2"). Clause 3 of the agreement provides that the sum of RM60,000 paid by the plaintiff under the agreement shall be treated and deemed to be the rental for the entire term of the lease period and no further moneys are required to be paid by the plaintiff to the company during the subsistence of the said lease. Clause 4 of the agreement provides that the company and the second defendant agree that the plaintiff shall be absolutely entitled to utilise kilns numbers 12, 17 and 19 to the fullest in whatever manner the plaintiff deems fit and that the plaintiff shall be absolutely entitled to the profits accruing to the said kilns. By cl. 5 of the agreement, the company and the second defendant agreed and covenanted that the plaintiff shall have full and free use of the land described in the diagram annexed to the agreement and all access and right of way of all paths and roads leading to and/or serving the said land at all times and further the company and the second defendant shall not cause any obstruction to the plaintiff's aforesaid right of way or cause any inconvenience or nuisance to the plaintiff's use of the said land or paths and roads leading to and/or serving the said land. According to cl. 8 (i) of the agreement, the plaintiff shall be given 21 acres of land from the total acreage of land allotted by the relevant authorities to the company to extract mangrove trees for the plaintiff's kilns numbers 12, 17 and 19 and by cl. 8 (iii) of the agreement, the company and the second defendant shall not be entitled to extract any mangrove trees from the said 21 acres of land given to the plaintiff.

The plaintiff testified that initially he was accorded that 21 acres of land and he managed to operate the charcoal kilns numbers 12, 17 and 19. The plaintiff initially was the authorised representative of the company for the purposes of liasing and dealing with the relevant authorities for the allocation and allotment of mangrove lands to the company and upon the company being allotted those lands, the plaintiff would have access and egress to those portions in accordance with the agreement. Though the second defendant, under examination in chief, testified that the plaintiff had quiet possession of kilns numbers 12, 17 and 19 for a period of four to five years, yet trouble started to brew on 1 October 1985 when the company wrote a letter to the Forestry Officer, Larut and Matang, Taiping that only the second defendant had the authority to sign all correspondences emanating from the company (see p. 67 of "AB 2"). Being dissatisfied, the plaintiff protested. This protest was finally resolved by the company's board, of directors' meeting which took place on 5 March 1986 (see p. 87 of "AB 2") where in the penultimate paragraph of the minutes of that meeting it was resolved that:

> The meeting further agreed that henceforth all correspondence(s) with the Forest Department Authority in so far as it is beneficial to the interest of the company shall be signed by either Mr. Tan Ghee Chuan (the second defendant) or Mr. Tan Bok Seong @ Tan Leong Tian (the plaintiff).

By letter dated 17 April 1986, the company secretary informed the Forestry Officer, Larut and Matang, Taiping (see p. 89 of "AB 2") of the company's resolution that the signatory to the company would either be the second defendant or the plaintiff. It is quite apparent that the company's resolution was not accepted by the Forestry Officer, Larut and Matang, Taiping and such rejection was reflected by letter dated 5 July 1986 where it was categorically stated that the Forestry Department needed only one person to sign the correspondence - either the second defendant or the plaintiff and not a choice of either one of them (see p. 91 of "AB 2"). By letter dated 20 November 1986, the company conveyed the message to the Forestry Officer, Larut and Matang, Taiping by way of a reply and in that letter the company appointed the second defendant to sign all the correspondences of the company (see p. 94

of "AB 2"). But despite being appointed, the second defendant failed or neglected to apply for the permits from the Forestry Department to extract the mangrove trees and such defaults ran counter to the agreement.

Since the plaintiff refused to attend the board meeting of the company, the company applied to the High Court, Shah Alam by way of an originating summons no: 24-176 of 1990 and obtained an order dated 21 June 1990 wherein the plaintiff was directed by the Court:

> To attend an emergency meeting of the board of directors of Sin Bee Seng and Co. (Port Weld) Sdn. Bhd. on Friday 20 July 1990 at 11.00 a.m. at 146-A, Jalan MacAlister, 10400 Penang to deal with all such matters as may be stated in the agenda to be specified by the company secretary in a notice of the said meeting which shall be issued by the company secretary together with a copy of this order and in the event that Tan Bok Seng @ Tan Leong Tian (the plaintiff) do fail to attend the said meeting then this Court hereby authorises Tan Tiong Kheng @ Tan Tiong Hun (the third defendant) to vote on behalf of Tan Bok Seong @ Tan Leong Tian (the plaintiff) aforesaid on all matters specified in the said agenda.

On 20 July 1990, the meeting of the board of directors was held but it was reported that meeting could not get off the ground because the two directors that were present wanted to chair the meeting (see p. 119 of "AB 2"). Presumably, by looking at p. 119 of "AB 2", the two directors were none other than the plaintiff and the third defendant. On 10 October 1991, the third defendant applied to the High Court, Shah Alam *vide* Originating Summons No: 24-353-1991 and successfully obtained an order for an extraordinary general meeting of the company to be held at 146-A, MacAlister Road, 10400 Penang on 15 November 1991 on an agenda to be prepared by the secretary of the company. Surprisingly, the agenda of the company for the board of directors meeting scheduled on 15 November 1991 (see p. 136 of "AB 2") discussed the appointment of the second defendant as a director of the company and the vesting of the management of the company to the third defendant with immediate effect. The question to ask is this: Why must the second defendant be appointed as a director of the company during the board of directors' meeting held on 15 November 1991 since he was already the company's director under the memorandum and articles of association of the company as reflected at p. 24 of "AB 2"? The answer can be discerned from the evidence of the second defendant himself when he was being cross-examined. The second defendant admitted that he was declared a bankrupt in regard to some other company but he could not remember the exact date of his bankruptcy. When confronted with p. 124 of "AB 2" where the affidavit of the third defendant affirmed on 31 May 990 in support of the Originating Summons No: 24-176 of 1990 especially para. 8 thereof (where it was deposed that the second defendant was a bankrupt), the second defendant agreed that on 31 May 1990 he was a bankrupt. The second defendant admitted further, under cross examination, that during the pendency of his bankruptcy, the company was run by the plaintiff. On 17 January 1992 (see p. 137 of "AB 2") another board of directors' meeting was convened and the agenda must have shocked the plaintiff. The agenda reads, *inter alia*, as follows (the relevant parts only):

> (1) To consider the appointment of Mr. Tan Kok Heng @ Tan Tiong Kheng (the fourth defendant) and Madam Tan Siew Siong (the fifth defendant) as additional directors of the company;
>
> (2) To consider the proposal for the exclusion of Mr. Tan Bok Seong (the plaintiff) as one of the official signatories of all company's matters.

That board of directors' meeting on 17 January 1992 (see p. 138 of "AB 2") was not attended by the plaintiff as he knew his days in the company were numbered. Undaunted, the plaintiff wrote a seven paragraph letter to the Forestry Officer, Forestry Department, Larut and Matang, Taiping dated 19 June 1992 (see p. 143 of "AB 2") and in that letter he aired his grievances

and emphasised as to his rights and obligations under the agreement which agreement was also enclosed in that letter. On the same date (19 June 1992), the plaintiff sent a stern letter which, for brevity, is reproduced hereunder (see p. 145 of "AB 2"):

Tan Bok Seong,
128 Batai Avenue,
Jalan Thomson,
Taiping, Perak.
19 June 1992

Dear Sirs,

Re: Sin Bee Seng Co. (Port Weld) Sdn. Bhd. ("Sin Bee Seng")
Allotment of Mangrove land by the Forestry Department
Two Agreements Among Sin Bee Sin, Tan Bok Seong
and Tan Ghee Chuan both dated 18 October 1985

I refer to the above agreements and to the recent 1992 allocation and allotment of mangrove land by the forestry department for the charcoal kilns currently being worked by Sin Bee Seng and myself.

Notwithstanding the express provisions in the agreements dated 18 October 1985, and in particular the express term that Sin Bee Seng would allot to me 21 acres of any land for the extraction of mangrove that Sin Bee Seng is allotted by the Forestry Department, Sin Bee Seng, its servants or agents have impeded my attempts to gain access to extract mangrove by refusing to do what is required by the Forestry Department so as to enable my workers and I to work the recent allotment of mangrove land by the Forestry Department.

This is a breach of the agreements and I intend to ensure that the agreements and the terms therein are honoured.

I hereby give you notice that I shall hold Sin Bee Seng and all its other directors liable for all the losses and damages that I have suffered and will suffer should Sin Bee Seng and/or its directors having control of the company continue to fail, refuse or neglect to comply with the terms of the agreements.

Yours faithfully,

(Sgd)

(1) Sin Bee Seng & Co. (Port Weld) Sdn. Bhd.,
146-A MacAlister Road,
10400 Penang.

(2) The Company Secretary,
Sin Bee Seng & Co. (Port Weld) Sdn. Bhd.,
146-A MacAlister Road, 10400 Penang.

(3) Mr. Tan Tiong Keng @ Tan Tiong Hun,
The Director,
Sin Bee Seng & Co. (Port Weld) Sdn. Bhd.,
No.16, Jalan SS 15/5F
Subang Jaya,
47500 Selangor.

(4) Tan Ghee Chuan,
48 Jalan Haiwan, Taiping,
Perak.

There was no reply to this letter. Bad blood was in the air. By an extraordinary general meeting of the company that was scheduled to be held at 13-1B, 13th Floor, Pertama Complex, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur on 30 July 1992 at 10.00 a.m., it was resolved to remove the plaintiff as director of the company and this resolution pulled through without a hitch. The company secretary by notice dated 1 July 1992 alerted the plaintiff of this impending extraordinary general meeting (see p. 147 of "AB 2").

To recapitulate the following salient facts need to be highlighted:

(1) On 29 March 1979, the plaintiff and the second defendant set up the company and they were the directors of the company under and by virtue of its memorandum and articles of association (see p. 24 of "AB 2");

(2) On 18 October 1985, an agreement between the plaintiff, the second defendant and the company was entered wherein the plaintiff paid RM60,000 to the second defendant in exchange for the company's lease of ninety-nine (99) years on kilns numbers 12, 17 and 19 or until the company winds up or when the TOL is withdrawn or terminated by the relevant authority whichever is the earlier;

(3) On 31 May 1990, the second defendant became a bankrupt and, consequently, the affairs of the company was managed by the plaintiff;

(4) Though the plaintiff benefitted under the agreement, he had to undergo numerous obstacles (as amplified in the early part of this judgment) caused by the second defendant which finally culminated in the removal of the plaintiff as a director of the company on 30 July 1992.

On these facts, the plaintiff sought for specific performance of the agreement entered between the plaintiff, the company and the second defendant and/or damages for breach of contract. The plaintiff also sought for damages for conspiracy against the second, third, fourth and fifth defendants and each of them. The plaintiff also prayed for interest on all the damages to be awarded and costs.

It was argued on behalf of the defendants that the agreement particularly cl. 1 of p. 70 "AB 2" was an assignment of the TOL and, consequently, was illegal for contravening s. 68 of the National Land Code. Clause 1 of the agreement reads as follows:

> Clause 1. In consideration of the above premises and the sum of ringgit sixty thousand (RM60,000) only (hereinafter referred to as "the said rental") now paid by Tan Bok Seong to the company (the sum whereof the company hereby acknowledges) the company hereby leases the said charcoal kilns number(s) 12, 17 and 19 to Tan Bok Seong for a term of ninety nine (99) years or until the company winds up or when the said licence is withdrawn or terminated by the relevant authority whichever is the earlier, and upon the terms and conditions hereinafter contained.

Section 68 of the National Land Code enacts as follows:

> 68. Except in so far as it is otherwise provided, a temporary occupation licence shall not be capable of assignment; and every such licence shall, except as provided in s. 416, terminate on the death of the person, or dissolution of the body, for the time being entitled to the benefit thereof.

It is appropriate to mention here that the provision of s. 416 of the National Land Code which is on statutory vesting is not applicable to the present case.

Salleh Abas CJ (Malaya) (as he then was) interpreted s. 68 of the National Land Code in the case of *Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy* [1983] 2 MLJ 121 FC in erudite terms. This was what his Lordship said:

> It is obvious from this section that a TOL, being a licence only confers a personal right to the licence holder. This right comes to an end when the holder in the case of a natural person dies or in the case of a company or a firm or other bodies is dissolved. Being a personal right, the legal relationship thereby created is only between the licensor and the licensee. The licence is therefore non-transferable or incapable of assignment at the option of the licensee. It is not a right *in rem* which its holder can deal with as he or it pleases to the detriment of the issuing authority. Thus any assignment or arrangement purporting to transfer or assign the whole or any part of the licensed land will be illegal under s. 24 of the Contracts Act (see *Hee Cheng v. Krishnan* [1955] MLJ 103 and *Murugesan v. Krishnasamy & Anor.* [1958] MLJ 92).

The plaintiff in *Hee Cheng v. Krishnan* (*supra*) claimed specific performance or alternatively damages for breach of contract entered into between him and the defendant for the purchase of a house built upon a piece of land in respect of which a temporary occupation licence was issued, Thomson J (as he then was) held, on those facts, that:

> ... the alleged contract was in truth and in fact an attempt to sell and to purchase the defendant's rights under the temporary occupation licence. As such, it was in my opinion, unlawful by reason of s. 24 of the Contracts Ordinance as being of such a nature that if permitted it would defeat the provisions of any law and that it is therefore by reason of that section void.

His Lordship further observed that:

> The land in question is State land. Dealings in State land, other than mining land and land in Malay reservation, are subject to the provisions of the Land Code and any subsidiary legislation enacted under it. The licence with which I am here concerned was issued under Regulation 40 of the Land Rules 1930 and by r. 41 of these rules it is stated in terms "No licence for the temporary occupation of State land shall be transferable". That is the provision of the law which would be defeated if effect were given to a contract of this nature.
>
> In that connection I quote the following passage from Pollock and Mulla's book on the *Indian Contract Act,* 7th Edition, p. 145:
>
> > Where a specific kind of land or specific rights in land have been declared by the legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section.
>
> 'The section', of course being s. 23 of the Indian Contract Act.

Reading the judgment of Thomson J in *Hee Cheng v. Krishnan (supra)*, it is plain that his Lordship was of the view that an agreement which was an attempt to sell and to purchase a licensee's rights under a TOL was an agreement which fell within the scope of s. 24 of the Contracts Ordinance and was therefore void.

The defendants in *Murugesan v. Krishnasamy & Anor.* [1958] 24 MLJ 92 were in occupation of land under temporary occupation licence. They subsequently applied for EMR titles in respect of the land. The defendants then entered into an agreement with the plaintiff which, *inter alia*, recited that the defendants had applied for State land and provided that for the considerations stated the defendants agreed to execute valid transfers of the lands to the plaintiff as soon as titles were issued by the Collector of Land Revenue. The agreement further provided that in the meanwhile the plaintiff was to enter on the lands and enjoy the proceeds thereof. Subsequently, the applications of the defendants for EMR titles were

refused. The plaintiff thereupon claimed the return of the money paid by him as the contract had become impossible of performance. The defendants pleaded that as the agreements were attempts to sell and purchase rights under temporary occupation licences and were therefore unlawful the contract was void for illegality and the loss must fall where it lies. It was held *inter alia* that, firstly, the promises to the effect that pending the execution of transfers the purchaser was to enter into the lands and occupy it was an attempt to transfer to him at least a part of the vendors' rights under the temporary occupation licences and was therefore void. Secondly, that the illegal promise in the agreements can be severed from the other provisions of the agreements and the agreements are good and binding contracts for the sale and purchase of lands. Thirdly, in the events which have occurred the contracts have become void by reason of supervening impossibility and the plaintiff was entitled to recover his purchase money. Thomson CJ observed (at p. 93 right hand column at 'G' onwards):

> Before preceeding further I would observe that it involves a certain if not an undue straining of language to describe the agreements in question in the present case as agreements for sale and purchase of rights under a temporary occupation licence. Primarily, they are clearly agreements for sale and purchase of the right, title and interest in pieces of land. Nevertheless, they do contain the clause which has been quoted to the effect that pending the execution of transfers the purchaser is to enter into the land and occupy it and clearly of course this amounts to an attempt to transfer to him, at least, a part of the vendors' rights under the temporary occupation licences.
>
> But does that render the agreements as a whole void?
>
> It is well settled law that if several distinct promises are made for one and the same lawful consideration and one or more of these promises is such as the law will not enforce that will not of itself prevent the rest from being enforceable.

After discussing a few authorities, his Lordship proceeded to say (at p. 94 left hand column at 'H' onwards):

> The agreements in the present case are in writing and it is well settled that the Court will not enquire into the adequacy of the consideration stated in such writing. In my opinion, they are to be read as if the clause relating to occupation of the land before transfer did not exist and they are good and binding contracts for the sale and purchase of the pieces of land in question for $1,370 and $680 respectively. These sums have been paid it follows that in the ordinary course of things, if the defendants had failed to give valid transfers of the lands, the plaintiff would have been entitled to specific performance or to damages for breach.
>
> In the events which have occurred, however, the failure of the defendants to perform their side of the agreements has resulted from supervening impossibility. The contracts are therefore void by reason of s. 57 of the Ordinance. It is, however, to be noted that it is not a case of agreements which are void and have never become contracts by reason of illegality but of contracts which have been avoided by circumstances such as are contemplated in s. 57. I fail therefore to see any reason why the plaintiff should not recover the purchase money in accordance with s. 66.
>
> The second defendant, therefore must refund to the plaintiff the sum of $680.

The defendant in *Tan Bing Hock v. Abu Samah* [1968] 1 MLJ 221 held a licence to extract timber from a specified forest area. He entered into a contract with the plaintiff by which for a consideration of $2,000, the right to extract timber was assigned to the plaintiff. The contract was in contravention of rr. 2 and 18 of the Forest Rules 1935 which provide that no licence issued thereunder shall be transferable. The plaintiff brought an action for breach of the contract. He did not dispute the fact that the contract on which the action was founded was illegal, but contended that he was entitled to recover damages on the ground that he was not aware of the illegality. Gill J held that the evidence showed that both parties were in

pari delicto. The loss must lie where it fell. The plaintiff could not found an action on the illegal contract to recover damages from the defendant. His Lordship cited with approval the decision of Thomson J (as he then was) in *Hee Cheng v. Krishnan (supra*) as an authority for the proposition that where an action was founded on an illegal contract, it could not be enforced in a Court of law.

In my judgment, on the facts, *Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy (supra), Hee Cheng v. Krishnan (supra)* and *Murugesan v. Krishnasamy & Anor. (supra*) could easily be distinguished. Those cases dealt with transactions or colourable transactions amounting to assignment of TOLs. Even *Tan Bing Hock v. Abu Samah (supra*) dealt with a colourable transaction amounting to an assignment of licence to take forest produce from the forest area.

Now, a close perusal of the agreement in the present case would show that the contract is a contractual licence to use three kilns. It does not purport to transfer or assign any interest or any right in the relevant TOL land. Clause 1 of the agreement provides that:

> The company hereby leases the said charcoal kilns numbers 12, 17 and 19 to the plaintiff for a term of ninety nine (99) years or until the company winds up or when the said licence is withdrawn or terminated by the relevant authority whichever is the earlier.

By way of an example, I need only rely on the case of *Govindaraju v. Krishnan* [1962] 28 MLJ 334 where the brief facts were that the appellant whose premises stood on State land of which he was in lawful possession under a temporary occupation licence rented two rooms to the respondent at a monthly rent of $30. This tenancy was duly determined by a notice in writing. Though the tenancy was not one protected by the Control of Rent Ordinance 1956, the respondent refused to deliver up possession arguing that the tenancy was illegal, void and of no effect because the appellant, was only the holder of a temporary occupation licence over the premises. The learned President held that this was a dealing with the temporary occupation licence and any dealing with such a licence was prohibited by rule 41 of the Land Rules. In the course of his judgment, Ismail Khan J, (as he then was) had this to say:

> As the point of law involved the interpretation of r. 41, I should have thought that the twelve words in which that rule is set out would be quoted in the judgment and their construction considered, such, however, was not the case. The rule says:
>
> > No licence for the temporary occupation of State land shall be transferable.
>
> Had the learned President kept these words before him he could not have failed to ask himself:
>
> > Was the letting on a monthly tenancy of two rooms in a house built on State land a transfer or a colourable attempt to transfer the appellant's rights and interests under his temporary occupation licence?
>
> To this question there can be only one answer. There was no justification for substituting "any dealing" for "transfer" and making an unauthorised amendment in the Land Rules.

His Lordship Ismail Khan J (as he then was) then held that the letting of two rooms on the premises did not amount to a transfer of the licence. Likewise here, a lease of three kilns built on TOL land should not be regarded as a colourable attempt to transfer the company's rights and interests under the TOL to the plaintiff. In fact, the plaintiff's fate under the agreement to extract mangrove to burn in the three kilns would solely be dependent on the company's success at securing TOL lands from the Forestry Department. The company merely leases the three charcoal kilns to the plaintiff and not the TOL. The agreement comes to an

end on the happening of two pre-requisites. One, when the company winds up. The other is when the TOL is withdrawn. And if these two pre-requisites still subsist, the agreement is kept alive for ninety-nine (99) years.

Section 23 of the National Forestry Act, 1984 enacts as follows:

> 23. (1) Except as provided in subsections (2) and (3) a licence shall not be capable of transfer or assignment and every licence shall terminate on the death of the person, or dissolution of the body, for the time being the holder thereof.
>
> (2) A licence issued to a statutory body may be transferred or assigned with the prior written consent of the State Authority.
>
> (3) The State Authority may, in the event of the death or incapacity of the person for the time being the holder of a licence, authorize the transfer or assignment of the licence.

As I said earlier, on a plain and grammatical reading of cl. 1 of the agreement, it is not the intention of the parties to transfer or assign the licence to the plaintiff in contravention of s. 23(1) of the National Forestry Act 1984. The "lesen mengambil hasil hutan" issued by the Forestry Department (see p. 1 of "AB 2") was in the name of the company. It must not be forgotten that the plaintiff was an active company director from the inception of the company on 23 March 1979 until he was finally ousted as a director on 30 July 1992. Even the plaintiff's letter dated 19 June 1992 to the defendants as reproduced in the early part of this judgment, reflected the attitude of the plaintiff in that the agreement was not a transfer or an assignment of the licence to him but rather his right to extract mangrove to burn in the three kilns of his.

Next, it was argued that there was a breach of s. 131 subsection (1) and subsection (5) of the Companies Act 1965 and the contravention of these provisions would render the agreement void under s. 24 of the Contracts Act 1950. For convenience, s. 131 subsection (1) and subsection (5) of the Companies Act 1965 are reproduced below;

> 131. (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.
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> 131 (5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature character and extent of the conflict.

To my mind, it is manifestly clear, that in enacting s. 131 subsections (1) and (5) of the Companies Act 1965, Parliament had intended for criminal sanctions to be levied against the directors without providing civil remedies thereunder. This meant that the common law remedy would be available to the company. Under the common law, the contract would be voidable at the option of the company. I venture to say that the contract would stand even under the following conditions:

(1) where it is not possible to restore the asset or cash passed under the contract to the company;

(2) where the company has been indemnified against any loss; and

(3) where a third party has acquired rights for value without notice of the prohibited contract and thereby suffer by the avoidance.

The question to ask here is this: Has the company rescinded that agreement within a reasonable time? If not then the agreement will stand. This simple principle of law can be distilled from the case of *Hely-Hutchinson v. Brayhead Ltd. And Another* [1968] 1 QB 549 CA. There, the facts were that R, the chairman of the defendant company, B, acted as its *de facto* managing director. He was the chief executive who made the final decision on any matters concerning finance. He often committed B to contracts without the knowledge of the board and reported the matter afterwards. The board knew of and acquiesced in that. In July 1964, the plaintiff, the chairman and managing director of a public company, P, gave a personal guarantee to bankers for a loan of 50,000 pound to P. Towards the end of 1964 P was sustaining losses and needed financial assistance. B was prepared to help, with the intention eventually to obtain control of P. In January 1965, B bought 750,000 P ordinary shares from the plaintiff for over 100,000 pound and proposed to inject 150,000 pound into P. About the same time the plaintiff became a director of B, but did not attend any board meetings until 19 May 1965. After that meeting, in an office outside, in a discussion between R and the plaintiff, the plaintiff agreed to put more money into P if B would secure his position. To that end R, on behalf of B as chairman signed two letters on B's paper dated 19 May 1965, and addressed to the plaintiff. In one P purported to indemnify the plaintiff against loss on his personal guarantee of 50,000 pound and in the other B purported to guarantee to repay money lent by the plaintiff personally to P. In reliance on those letters the plaintiff advanced 45,000 pound to P.

Article 99 of B's articles of association provided that:

> A director may contract with and be interested in any contract ... with the company ... and shall not be liable to account for any profit made by him by reason of any such contract ... provided that the nature of the interest of the director in such contract ... be declared at a meeting of the directors as required by ... s. 199 of the Companies Act 1948, but no disclosure of the two contracts was in fact made to the board.

Despite the plaintiff's and other advances by B, P's financial position remained hopeless and it went into liquidation. The plaintiff was called to honour his guarantee. He paid the bankers 50,000 pound and claimed that sum and the 45,000 pound lent to P, from B. B denied liability contending that R had no authority to sign the letters, alternatively, that since the plaintiff had not disclosed his interest in the contracts as required by article 99 of B's articles of association and s. 199 of the Companies Act 1948, the contracts were unenforceable. Roskill J held that although R had no actual authority to enter into contracts, he had ostensible or apparent authority to do so; that the plaintiff's breach of article 99 of B's articles of association and s. 199 of the Companies Act, 1948, only rendered the contracts voidable, not void or unenforceable; and that the plaintiff was entitled to recover. On appeal by B, it was held (dismissing the appeal) that, on the facts R had actual authority to be implied from the conduct of the parties and the circumstances of the case to enter into the two contracts with the plaintiff. It was also held that while s. 199 of the Companies Act 1948 imposed a statutory duty of disclosure under sanction of a monetary penalty, non-disclosure did not render a contract void, but only voidable at the instance of the company for the effect of article 99 was that proper disclosure validated a contract which might otherwise be unenforceable at the instance of the company and relieved the director from the consequences of the general law relating to contracts *uberrimae fidei*, but it did not otherwise alter the effects of non-disclosure; and that, accordingly, the plaintiff's failure to disclose his interest merely rendered the contracts voidable and, it being conceded that avoidance was no longer possible, both contracts were enforceable by the plaintiff.

Lord Pearson in *Hely-Hutchinson v. Braybead Ltd. And Another (supra*) approached the case in this way:

> It is not contended that s. 199 (equivalent to our s. 131 of the Companies Act 1965) in itself affects the contract. The section merely creates a statutory duty of disclosure and imposes a fine for non-compliance. But it has to be read in conjunction with article 99. The first sentence of that article is obscure. If a director makes or is interested in a contract with the company, but fails duly to declare his interest, what happens to the contract? Is it void, or is it voidable at the option of the company, or is it still binding on both parties, or what? The article supplies no answer to these questions. I think the answer must be supplied by the general law, and the answer is that the contract is voidable at the option of the company, so that the company has a choice whether to affirm or avoid the contract, but the contract must be either totally affirmed or totally avoided and the right of avoidance will be lost if such time elapses or such events occur as to prevent rescission of the contract; *Great Luxembourg Railway Co. v. Magnay* [1858] 2 Beav 586, 593, 594; *In re Cape Breton Co.* 26 Ch D, 22l, 223, 228, 229, 234; *Kaye v. Croydon Tramways Co.* [1898] 1 Ch 358, 368; *Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co.* [1914] 2 Ch 488, 505; and *Cook v. Deeks* [1916] 1 AC 554, 563, 564 PC.

Incidentally, the above passages were quoted with approval by the House of Lords in the case of *Guinness PLC v. Saunders* [1990] 2 AC 663 HL (especially p. 697 of the judgment of Lord Goff of Chieveley).

On the available evidence before me, it is my judgment that there was *de facto* declaration by the plaintiff of his interest in the company for the following reasons:

(1) At the material time there were three directors of the company *viz*, the plaintiff, the second defendant and the third defendant. They were no strangers to one another. The company was, so to speak, a family business. Only the plaintiff and his elder brother *viz*, the second defendant were the signatories to the agreement and these two directors could constitute a meeting. An irresistible inference can be deduced that the plaintiff had declared his interest to the second defendant when they both met and discussed about the agreement. The plaintiff paid RM60,000 to the second defendant who admitted receiving the same and such payment is supported by the receipt that was issued on 5 August 1983 (see p. 51 of "AB 2 "). By simple deduction if the second defendant knew about the agreement the first defendant (the company) should likewise be said to have the necessary knowledge of that agreement.

(2) In the absence of any specific or prescribed form of declaration of interest, the negotiations between the plaintiff and the second defendant which culminated in the signing of the agreement should reasonably be construed as sufficient declaration of the plaintiff's interest in the agreement.

(3) The company must have notice, whether actual or constructive, of the plaintiff's interest in the agreement when that agreement was finally signed by the two directors *viz*, the plaintiff and the second defendant.

It is germane to mention that by article 96 of the articles of association of the company (see p. 35 of "AB 2") the company allows the director to contract with the company provided that the nature of the interest of the director in any such contract be declared at a meeting of the directors as required by s. 131 of the Companies Act, 1965. I am of the view this disclosure requirement is intended to cover the situations where the interests, whether direct or indirect, are not apparent, it goes without saying that a company must be protected from being unfairly exploited by a director who acted contrary to the interest of the company, Lord Cranworth LC in *Aberdeen Railway Co. v. Blaikie Brothers* [1854] 2 Eq Rep. 1281 at

1286 aptly described in cogent terms what a director should do:

> It is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.

But this general rule is subject to the qualification that the articles (just like article 96 of the articles of association in this case) may authorize a director to do something which would otherwise be a breach of duty (see for example *Furs Ltd. v. Tomkies* [1936] 54 CLR 583 at 592).

For the aforesaid reasons, I will answer the question posed earlier in the negative in that the company did not at any time rescind the agreement at all. The agreement therefore remains valid.

If I am wrong in construing that the plaintiff had rightly declared his interest in the company because of the peculiar constitution of the company at the material time, and that there was in fact no declaration of the plaintiff's interest at the board of directors' meeting, then applying *Hely-Hutchinson's* case (*supra*), I hold that the agreement was voidable. No steps were taken by the company to rescind the agreement and the company allowed that agreement to continue for at least five years. This very act of condoning the existence of the agreement would now serve as an estoppel by conduct. It is now too late in the day and it is not open to the defendants to say that the agreement is now void. It is now trite law that a contract can only be rescinded if the parties can be put in *status quo*. As Lord Blackburn aptly said in *Emile Erlanger And Other v. The New Sombrero Phosphate Company And Other* [1878] 3 App. Cas. 1218 (HL (E) Vol. III) especially at p. 1278:

> It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put in *status quo*. See per Lord Cranworth in *Addie v. The Western Bank* (Law Rep. 1 HL, SC 165). It is a doctrine which has often been acted upon both at law and in equity.

Another facet to the agreement is this. That was a tripartite agreement between the plaintiff, the company, and the second defendant. If it is construed that the agreement is void as against the company, it cannot be said to be void or voidable as against the second defendant. By cl. 4 of the agreement (see p. 71 of "AB 2"), the second defendant expressly agreed and covenanted that the plaintiff shall be absolutely entitled to use the charcoal kilns numbers 12, 17 and 19 to the fullest and that the plaintiff shall be absolutely entitled to the profits accruing thereto. Those were the contractual obligations of the second defendant and he cannot run away from it.

Next, it was argued that there was a breach of s. 132 C(1)(b) of the Companies Act 1965 in that there was:

> the disposal of a substantial portion of the company's undertaking or property, which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in the general meeting.

The short answer would be that this section was inserted by the Companies (Amendment) Act 1985 (Act. A616) which came into effect on 1 February 1986 *vide* PU(B) 30, Jilid 30, No. 2. Once again the same section was amended by the Companies (Amendment) Act 1986 (Act. A657) *vide* PU(B) 46 which came into effect on 1 February 1987. Since the agreement was signed on 18 October 1985, it follows that s. 132 C(1)(b) of the Companies Act 1965 which came after the event cannot apply to cripple the plaintiff's position.

It was next argued that evidence was not led as to the quantum of damages. This is certainly an argument that is devoid of merit. There was evidence that RM60,000 changed hands from the plaintiff to the second defendant and surely this must be the damages claimable by the plaintiff for the breach of the contract. Ong Hock Thye FJ (as he then was) in *Teoh Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39 FC made a pertinent observation in regard to the question of damages in these words:

> The yardstick could either be loss of profits or, in the alternative, compensation for capital loss and expenses rendered futile by the breach.

It was part and parcel of the plaintiff's case that the second, third, fourth and fifth defendants conspired to bring an end to the agreement thereby depriving the plaintiff of loss of profits and the damages sustained by the plaintiff can be inferred by way of loss of those profits. In *Goldsoll v. Goldman* [1914] 2 Ch 603 Neville J dealt with the question of damages for breach of contract in this way (see p. 615):

> Now comes a very much more difficult question, and a question with which the Courts have much less often to deal, about damages in such a case for breach of contract, It is said that Mr. Sessel incited and procured Mr. Goldman to break the contract that I have referred to, with the contents of which Mr. Sessel was aware. In my opinion, Mr. Sessel was fully aware of the terms of the contract made between Mr. Goldsoll and Mr. Goldman, and I also think that in obtaining from Mr. Goldman the names of the customers, the name cards and the Register, he was inducing Mr. Goldman to do what he perfectly well knew Mr. Goldman was not entitled to do, and therefore I think he has committed an actionable wrong to the plaintiffs subject to one question, and that is the question of damages. I must say the cases are not very clear upon the point, but in my opinion it is one of those cases in which damages are essential to the right of action by the covenantee against one who has induced his covenantor to break the contract with him. But in this case there is evidence of damage which I think sufficient, and in addition to that I think authorities will bind me - notably the case of *Exchange Telegraph Co. v. Gregory & Co.* [1896] 1 QB 147 shew that in such a case the damage may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage which has been occasioned him.

In regard to the conspiracy between the second, third, fourth and fifth defendants, the plaintiff must have felt threatened when the third defendant was appointed by the High Court, Shah Alam by order dated 21 June 1990 to vote in the emergency meeting of the board of directors of the company scheduled on 20 July 1990 on behalf of the plaintiff in the event the plaintiff was absent in that meeting. The plaintiff's position was further threatened when the agenda for the board of directors meeting which was scheduled on 15 November 1991, *inter alia*, included the vesting of the management of the company in the hands of third defendant with immediate effect. This meant that the plaintiff lost total management of the company which hitherto he had enjoyed when the second defendant became a bankrupt. The situation further worsened when the fourth and fifth defendants were appointed additional directors in the board of directors meeting that was held on 17 January 1992 and on that very day too, the plaintiff was relieved of his duty as one of the official signatories of the company. Thus, when the second defendant and his children took control of the company, the plaintiff finally found himself ousted as director of the very company which he helped to form. That was the last straw that broke the camel's back and that was the magnitude of the conspiracy of the second defendant and his children. That conspiracy was the cause and effect of the breach of the agreement. In my judgment, the act of knowingly to procure or to induce a third party to break its contract to the damage of the other contracting party without reasonable justification or excuse is a tortious wrong. Translated to the facts of the present

case, the predominant purpose of the defendants in striping the initial power of the plaintiff in liasing and dealing with the Forestry Department for the allocation and allotment of mangrove lands to the company was solely to injure the plaintiff. Lord Macnaghten put it appropriately when he said in *Quinn v. Leathem* [1901] AC 495 at 510:

> ... that a violation of legal right committed knowingly is a cause of action, and ... it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

In the same vein, Viscount Simon LC said in *Crofter Hand Woven Harris Tweed Co. Ltd., and Other v. Veitch and Another* [1942] AC 435 especially at p. 445:

> It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy.

An argument was advanced that the agreement was void for uncertainty. The short answer is found in cl. 1 of the agreement where the lifespan of that agreement was specifically spelt out. Even if there was a semblance of uncertainty, on the authority of *Sudbrook Trading Ltd. v. Eggleton* [1983] AC 44, the Courts are generally slow in striking down commercial agreements on the grounds of uncertainty. In that case, the lease gave a tenant an option to purchase the premises "at such price as may be agreed upon by two valuers, one to be nominated by each party". The landlord having refused to appoint a valuer, the House of Lords held that the option did not fail for uncertainty.

For the reasons adumbrated above, I made the following orders:

(1) As against the first defendant company and the second defendant and each of them, I ordered that judgment be entered in favour of the plaintiff for the breach of contract. I too ordered that damages to be assessed by the Senior Assistant Registrar for breach of that contract.

(2) As against the second, third, fourth and fifth defendants and each of them, I ruled that there was conspiracy and that damages to be assessed by the Senior Assistant Registrar for that conspiracy.

(3) Interests on all damages awarded to be at the rate of 8% per annum from the date of the award to the date of full realisation.

(4) Costs should rightly go to the plaintiff.